

CERTIFIED FOR PARTIAL PUBLICATION
IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FIVE

THE PEOPLE,
Plaintiff and Respondent,
v.
LUIS E. BERMUDEZ,
Defendant and Appellant.

A119028
(City and County of San Francisco
Super. Ct. No. 184061)
ORDER MODIFYING OPINION
AND DENYING REHEARING
[NO CHANGE IN JUDGMENT]

THE COURT:

It is ordered that the published portion of the opinion filed herein on March 27, 2009, be modified as follows:

1. The third full paragraph beginning on page 5 with “An April 4 1980 letter” and ending on page 6 with “ ‘cannot show prejudice’ ” is deleted.

2. At the end of the second full paragraph on page 6, after the sentence ending “for the filing of petitions . . . ,” add as footnote 6 the following footnote, which will require renumbering of all subsequent footnotes:

⁶ A reviewing court may consider correspondence directed to the Governor’s office in determining legislative intent. (*Karlin v. Zalta* (1984) 154 Cal.App.3d 953, 968, fn. 9; accord, *Shapero v. Fliegel* (1987) 191 Cal.App.3d 842, 847, fn. 5.)

so that the paragraph now reads:

Finally, a September 11, 1980 letter to Governor Brown, Jr., from Yolo County District Attorney Richard L. Gilbert, a sponsor of Assembly Bill No. 2861 (1979-1980

Reg. Sess.), urging the signing of the bill, provides, “The bill has been amended in a number of particulars since its first introduction in order to provide . . . limitations on the time period for the filing of petitions”⁶

⁶ A reviewing court may consider correspondence directed to the Governor’s office in determining legislative intent. (*Karlin v. Zalta* (1984) 154 Cal.App.3d 953, 968, fn. 9; accord, *Shapero v. Fliegel* (1987) 191 Cal.App.3d 842, 847, fn. 5.)

3. On page 7, following the first full paragraph beginning “Moreover, this statutory” add the following paragraph:

For the first time on appeal, appellant asserts that a determination by this court that section 851.8(*l*) limits the time for filing a petition under section 851.8(*c*) constitutes a new rule of law and should not be applied to him because he was not on notice that the section 851.8(*l*) time limits applied to his case. Thus, he argues it would violate his right to due process to deny his petition on grounds of untimeliness. Appellant’s failure to raise this constitutional objection below waives the issue on appeal. (*People v. Rudd* (1998) 63 Cal.App.4th 620, 628.) Moreover, long before appellant filed his petition, the *Bermudez* court recognized the interplay of sections 851.8(*c*) and 851.8(*l*) as an issue and, in dicta, noted that the Legislature apparently intended section 851.8(*l*) to apply to all section 851.8 petitions. (*Bermudez, supra*, 215 Cal.App.3d at p. 1230, fn. 5.) Thus, even if appellant’s argument were cognizable on appeal, we would conclude that principles of due process do not prohibit application of the time limits of section 851.8(*l*) to his petition.

so that the opinion reads:

Moreover, this statutory interpretation is reasonable. Section 851.8(*c*) serves to prevent a petitioner from filing a section 851.8 petition for relief while the criminal action is pending. The two-year limitation period in section 851.8(*l*) guards against the presentation of stale claims of factual innocence and encourages a swift conclusion to section 851.8 petitions. However, if good cause for the delay exists, and the prosecution is not prejudiced by it, the late filing is permitted.⁷

For the first time on appeal, appellant asserts that a determination by this court that section 851.8(l) limits the time for filing a petition under section 851.8(c) constitutes a new rule of law and should not be applied to him because he was not on notice that the section 851.8(l) time limits applied to his case. Thus, he argues it would violate his right to due process to deny his petition on grounds of untimeliness. Appellant's failure to raise this constitutional objection below waives the issue on appeal. (*People v. Rudd* (1998) 63 Cal.App.4th 620, 628.) Moreover, long before appellant filed his petition, the *Bermudez* court recognized the interplay of sections 851.8(c) and 851.8(l) as an issue and, in dicta, noted that the Legislature apparently intended section 851.8(l) to apply to all section 851.8 petitions. (*Bermudez, supra*, 215 Cal.App.3d at p. 1230, fn. 5.) Thus, even if appellant's argument were cognizable on appeal, we would conclude that principles of due process do not prohibit application of the time limits of section 851.8(l) to his petition.

There is no change in the judgment.

Respondent's petition for rehearing is denied.

Dated: April 20, 2009 _____, P.J.